



State of New Jersey DOCKET FILE COPY ORIGINAL

DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF LAW
124 HALSEY STREET

PO BOX 45029
NEWARK, NJ 07101

E-Mail: provocug@law.dol.lps.state.nj.us

(973)648-3709

July 5, 2001

DONALD T. DiFRANCESCO
Acting Governor

JOHN J. FARMER, JR.
Attorney General

JEFFREY J. MILLER
Assistant Attorney General
Director

Aaron Goldberger, Esq.
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 6A266
Washington, D.C. 20054

RECEIVED
JUL 23 2001
FCC MAIL ROOM

Re: CC Docket No. 00-49

Dear Mr. Goldberger:


We are in receipt of the June 28, 2001 letter of the New Jersey Division of the Ratepayer Advocate enclosing a copy of its brief which was filed in the United States Court of Appeals for the 3rd Circuit in AT&T Communications of New Jersey et al. v. Bell Atlantic-New Jersey, Inc., et al., Case No. 00-200, an appeal by the Ratepayer Advocate from the decision of Katharine S. Hayden, U.S.D.J., below. In order to provide you with a more balanced picture of the 3rd Circuit proceeding, we are enclosing a copy of the responsive brief of the New Jersey Board of Public Utilities in that Docket.

I certify that a copy of this letter has been sent by First Class mail to all parties on the attached service list. A copy of the enclosed brief will be provided upon request to any party to CC Docket No. 00-49.

Very truly yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By:



Eugene P. Provost
Deputy Attorney General

Enc.

- c: Magalie Roman Salas, FCC Secretary (w/enc.) ✓
Frederick K. Becker, Esq. (w/o enc.)
Anne S. Babineau, Esq. (w/o enc.)
Christopher J. White, Esq. (w/o enc.)
Bruce D. Cohen, Esq. (w/o enc.)
Frances L. Smith, Esq., BPU (w/o enc.)
Anthony Centrella, BPU (w/o enc.)
Elise Goldblat, DAG (w/o enc.)

No. of Copies rec'd 0
List A B C D E



I/M/O the Division of the Ratepayer Advocate
Petition for Declaratory Ruling
CC Docket Number: 00-49

SERVICE LIST

Eugene Provost, DAG
Dept. of Law & Public Safety
Division of Law
124 Halsey Street
P.O. Box 45029
Newark, NJ 07101

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II, TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

R. Gerard Salemm, SVP
Cathleen A. Massey, AGC
NEXTLINK Communications, Inc.
1730 Rhode Island Ave., N.W.
Suite 1000
Washington, D.C. 20036

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Charles C. Hunter, Esq.
Catherine M. Hannan, Esq.
Telecommunications Resellers Assoc.
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Daniel M. Waggoner, Esq.
Robert S. Tanner, Esq.
Davis Wright Tremain, LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005

Janice C. Myles
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Room 5-C327
Washington, D.C. 20554

Edward Sharkin, Esq.
Joseph DiBella, Esq.
Verizon New Jersey, Inc.
1320 North Court House Road
8th Floor
Arlington, VA 22201

Mark C. Rosenblum, Esq.
Roy E. Hoffinger, Esq.
Dina Mack, Esq.
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Glenn S. Richards, Esq.
David S. Konczal, Esq.
Shaw Pittman
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, DC 20006

Docket No. 00-2000
IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RECEIVED

JUL 23 2001

AT&T Communications of New Jersey, Inc.,
Plaintiff

FCC MAIL ROOM

State of New Jersey Division of the Ratepayer Advocate,
Plaintiff-Intervenor

v.

Bell Atlantic-New Jersey, Inc., and
The New Jersey Board of Public Utilities, an agency, and
Herbert H. Tate and Carmen J. Armenti, in their official
capacities as Commissioners of the Board of Public Utilities,
Defendants.

On Appeal from an Order of the
United States District Court, District of New Jersey

BRIEF OF THE APPELLEE
NEW JERSEY BOARD OF PUBLIC UTILITIES,
HERBERT H. TATE AND CARMEN J. ARMENTI IN THEIR OFFICIAL CAPACITIES

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
(973-648-3709)
Attorney for Defendant
New Jersey Board of Public
Utilities, and Herbert H.
Tate and Carmen J. Armenti,
in their official capacities
as Commissioners of the Board
of Public Utilities

ANDREA M. SILKOWITZ
ASSISTANT ATTORNEY GENERAL
ELISE GOLDBLAT
DEPUTY ATTORNEY GENERAL
Of Counsel

EUGENE P. PROVOST
DEPUTY ATTORNEY GENERAL
On the Brief

December 23, 2000



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
124 HALSEY STREET
PO BOX 45029
NEWARK, NJ 07101

CHRISTINE TODD WHITMAN
Governor

JOHN J. FARMER, JR.
Attorney General

(973) 648-3709

JEFFREY J. MILLER
*Assistant Attorney General
Director*

January 10, 2001

Via UPS Overnight Mail

Marcia M. Waldron, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: **AT&T Communications of New Jersey, Inc., v.
Bell Atlantic-New Jersey, Inc. et al.
Docket No. 00-2000**

Dear Ms. Waldron:

This letter is written to inform the Court and parties of certain corrections to inadvertent errors which occurred in the typing and preparation of the Brief of the Appellees New Jersey Board of Public Utilities, Herbert H. Tate and Carmen J. Armenti in their official capacities (collectively "Board") in the above matter. By this letter, we respectfully request that the Appellee Board's Brief be revised to reflect the following corrections:

Page 9, line 7: "BAa" should be "BAa71"

Page 9, line 10: "BAa-BAa" should be "BAa49-BAa60"

Page 12, line 1: "is" should be "it"

Page 14, line 3 (excluding point heading):
"remanded" should be inserted at the beginning
of line 3. The beginning of the sentence
should then read, "Pursuant to the District
Court's decision which remanded to the
Board..."

Page 14, last line: "ability" should be
"inability"; "long" should be "line"

January 10, 2001

Page 2

- - Page 15, line 1: "thermal" should be
"terminal"

Page 15, line 4: "model is generic proceeding,
the concluded" should be "model in its generic
proceeding, the Board concluded"

Page 15, line 6: "flows" should be "flaws"

Page 15, lines 1 and 7 and Page 17, line 11:
References to "Ba" should be "BAa"
(supplemental appendix filed with this Court
by Bell Atlantic-New Jersey, now Verizon New
Jersey).

While these revisions do not change the substance of the
Board's arguments, I apologize for these errors and any
inconvenience caused thereby.

Very truly yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By: Eugene P. Provost
Eugene P. Provost
Deputy Attorney General

EP:ac
cc: Lynn M. Caswell, Case Manager
Service List

AT&T COMMUNICATIONS OF NEW JERSEY, INC.

vs.

BELL ATLANTIC-NEW JERSEY, INC. ET AL

DOCKET NO. 00-2000

SERVICE LIST

Eugene P. Provost, Esq.
Dept. of Law & Public Safety
Division of Law
124 Halsey St.
P.O. Box 45029
Newark, N.J. 07101

Monica Otte, Esq.
AT&T Communications
of N.J., Inc.
295 North Maple Ave.
Room 3137C2
Basking Ridge, N.J. 07920

Frederick Pappalardo, Esq.
AT&T Communications
of N.J., Inc.
295 North Maple Ave.
Room 3136C2
Basking Ridge, N.J. 07920

David T. Zaring
U.S. Department of Justice
Federal Programs Branch
901 E Street, N.W., Room 907
Washington, D.C. 20004

Jodie Kelley, Esq.
Jenner & Block
601 13th St.
12th Floor
Washington, D.C. 20005

Frederic K. Becker, Esq.
Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
Woodbridge, N.J. 07095

Anne S. Babineau, Esq.
Wilentz, Goldman & Spitzer
90 Woodbridge Center Dr.
Suite 900 P.O. Box 10
Woodbridge, N.J. 07095

Blossom A. Peretz, Esq.
Div. Of the Ratepayer Advocate
31 Clinton, St., 11th Floor
P.O. Box 46005
Newark, N.J. 07101

Gary A. Greene, Esq.
AT&T Communications
of N.J., Inc.
295 North Maple Ave.
Room 3133C2
Basking Ridge, N.J. 07920

Samuel Moulthrop, Esq.
Riker, Danzig, Scherer
Hyland & Perretti
Headquarters Plaza
One Speedwell Ave.
P.O. Box 1981
Morristown, N.J. 07962

James H. Laskey, Esq.
Norris, McLaughlin & Marcus
721 Route 202-206
P.O. Box 1018
Somerville, N.J. 08876

James Bendernagel, Jr., Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006S

Barry S. Abrams, Esq.
Verizon New Jersey, Inc.
540 Broad Street
Newark, N.J. 07101

TABLE OF CONTENTS

Page Nos.

CORPORATE DISCLOSURE STATEMENT	1
COUNTER STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION ..	1
COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
COUNTER STATEMENT OF THE CASE	2
COUNTER STATEMENT OF FACTS	4
STANDARD OF REVIEW	13
STATEMENT OF RELATED CASES	13
ARGUMENT	
POINT I	14
THE BOARD'S DETERMINATION THAT, TO THE EXTENT THAT RATES, TERMS AND CONDITIONS HAD NOT BEEN SUCCESSFULLY NEGOTIATED, THE GENERIC RATES, TERMS AND CONDITIONS APPROVED BY THE BOARD AFTER EXTENSIVE EVIDENTIARY HEARINGS WERE APPLICABLE TO THE INTERCONNECTION AGREEMENT TO BE ENTERED INTO BETWEEN AT&T AND BA-NJ, IS A REASONABLE DECISION AND CONSISTENT WITH THE TELECOMMUNICATIONS ACT.	14
CONCLUSION	26
Certification of Bar Membership	

TABLE OF AUTHORITIES

CASES CITED

<u>AT&T Corp.v Iowa Utils. Bd., 525 U.S. 366 (1999)</u>	6
<u>City of Abilene, Texas v. FCC, 164 F.3d 49 (5th Cir 1999)</u>	23
<u>Division of Ratepayer Advocate v.</u> <u>New Jersey Board of Public Utilities,</u> Docket No. A-7421-95 (App. Div. August 23, 1996), <u>certif. denied,</u> 146 N.J. 498 (1996)	8
<u>GTE South Inc. v. Morrison,</u> 199 F.3d 733 (4th Cir. 1999)	13
<u>I/M/O the Board's Consideration of</u> <u>Procedures for the Implementation of</u> <u>Section 252 of the Telecommunications</u> <u>Act of 1996, BPU Docket No. TX96070540</u> (August 15, 1996)	8
<u>In the Matter of the Public Utility</u> <u>Commission of Texas. Memorandum</u> <u>Opinion and Order, FCC 97-346,</u> 13 FCC Rcd. 3460 (Oct. 1, 1997)	23
<u>Iowa Utilities Board v. Federal</u> <u>Communications Commission. et al.,</u> 109 F.3d 418 (8th Cir. 1996)	6
<u>Iowa Utilities Board v. Federal</u> <u>Communications Commission. et al.,</u> 219 F.3d 744 (8th Cir. 2000)	6

<u>Michigan Bell Telephone Co. v. Strand,</u> 26 E. Supp. -2d 993 (W.D. Mich. 1998)	25
<u>U.S. West Communications, Inc. v.</u> <u>MFS Intelenet, Inc.</u> , 193 E.3d 112 (9th Cir. 1999)	19

STATUTES CITED

28 <u>U.S.C.</u> § 1291	1
47 <u>U.S.C.</u> §151 <u>et seq.</u>	2, 4
47 <u>U.S.C.</u> §152 (b)	5
47 <u>U.S.C.</u> §251	5, 18, 24, 25
47 <u>U.S.C.</u> §251(d)(3)	25
47 <u>U.S.C.</u> §252	8, 9, 17, 18, 24
47 <u>U.S.C.</u> §252(b)(1)	9
47 <u>U.S.C.</u> §252(b)(4)(B)	18

47 <u>U.S.C.</u> §252(b)(4)(C)	9
47 <u>U.S.C.</u> §252(c)	18, 21
47 <u>U.S.C.</u> §252(d)	18, 21
47 <u>U.S.C.</u> §252(d)(1)	5
47 <u>U.S.C.</u> §252(d)(1)(A)	21
47 <u>U.S.C.</u> §252(e)(2)(B)	21
47 <u>U.S.C.</u> §252(e)(6)	1
47 <u>U.S.C.</u> §252(e)(5)	16
47 <u>U.S.C.</u> §252(f)	25
47 <u>U.S.C.</u> §252(g)	18, 19
47 <u>U.S.C.</u> §252(i)	23

	<u>Page Nos.</u>
47 <u>U.S.C.</u> §253(a)	5
47 <u>U.S.C.</u> §261(b) and (c)	25
47 <u>U.S.C.</u> §261(c)	2
<u>N.J.S.A.</u> 48:2-1 <u>et seq.</u>	1, 17
<u>N.J.S.A.</u> 48:2-13	1

OTHER AUTHORITIES

<u>Implementation of Local Competition Provisions</u> <u>of the Telecommunications Act of 1996. et al.</u> Docket No. 96-98 (August 8, 1996) ("Local Competition Order")	5, 6, 19, 24
--	--------------

CORPORATE DISCLOSURE STATEMENT

The New Jersey Board of Public Utilities ("Board") is an independent agency within the Executive Branch of the State Government. Originally created in 1911 as the Board of Public Utility Commissioners, the Board has general supervision and regulation of and jurisdiction and control over all public utilities and their property, property rights, equipment, facilities and franchises as far as may be necessary for the purpose of carrying out the provisions of Title 48 of the New Jersey Statutes Annotated. N.J.S.A. 48:2-1; 48:2-13.

COUNTER STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a June 2, 2000 opinion of the United States District Court for the District of New Jersey which, inter alia, affirmed the decision of the Board not to approve an interconnection agreement between AT&T Communications of New Jersey, Inc. ("AT&T") and Bell Atlantic New Jersey, Inc. ("BA-NJ")¹ which contained arbitrated rates, but instead to approve an interconnection agreement between AT&T and BA-NJ which contained the rates determined by the Board as a result of a generic proceeding. Federal jurisdiction was asserted to exist below by reason of 47 U.S.C. §252(e)6. (Aa7).² This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291, vesting in the Courts of Appeals jurisdiction over final judgements rendered by the District Courts.

¹ Bell Atlantic-New Jersey, Inc. is now known as Verizon New Jersey, Inc. For the sake of clarity we shall refer herein to the Company as Bell Atlantic-New Jersey, Inc. ("BA-NJ").

² "Aa" and "Ab" shall refer, respectively, to the appendix and brief of the Advocate filed with this Court. "BAa" shall refer to the supplemental appendix of BA-NJ filed with this Court.

COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that the New Jersey Board of Public Utilities has the authority under the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§151 ~~et seq.~~) (the "Act"), and where rates, terms and conditions of an interconnection agreement had not been successfully negotiated, to approve generic rates, terms and conditions determined by the Board to be consistent with the Act, instead of those approved by an arbitrator which were based on a cost study which the Board found to be seriously flawed?
2. Whether the District Court erred in holding that the New Jersey Board of Public Utilities has independent authority under the Act to impose additional State requirements not inconsistent with the Act under 47 U.S.C. §261(c)?

COUNTER STATEMENT OF THE CASE

This is an appeal by the New Jersey Division of the Ratepayer Advocate (the "Advocate") from a decision of the Honorable Katherine S. Hayden, U.S.D.J., which affirmed the Board's substitution of generic rates found by the Board to be consistent with the Act, for arbitrated rates which were based upon a flawed study "as a proper exercise of authority under the Act." (Aa13-Aa16). Alleging violation of the Act, the Advocate has asserted that such a substitution violates the Act because the Board's authority is limited to acceptance or rejection of arbitrated rates pursuant to Section 252 of the Act, and that 47 U.S.C. §261(c) does not provide independent authority for the Board's decision to substitute generic rates for arbitrated rates.

On December 8, 1995, in BPU Docket No. TX95120631, the Board initiated an investigation to determine under what terms and conditions local exchange competition should

be allowed in New Jersey. (BAa3).³ Public notices of this investigation were published in the New Jersey Register on January 16, 1996 and February 20, 1996. (*Ibid.*; BAa26-35). On February 8, 1996, the Act became effective. On June 19, 1996, the Board determined to take a two-step approach to continue the transition to a competitive telecommunications marketplace in New Jersey by establishing procedures for receiving and approving negotiated and arbitrated interconnection agreements, and by beginning a generic proceeding to determine the costs of a local exchange carrier's ("LEC's") basic telephone service, the appropriate generic rates, terms and conditions of interconnection, and wholesale rates applicable to all services. (BAa3; Aa94-96). A Prehearing Order was issued by the Board on August 7, 1996. (BAa36-43). An Order establishing procedures for the implementation of the interconnection agreement arbitration and approval provisions in Section 252 of the Act was issued on August 15, 1996. (BAa44-72). The generic evidentiary hearings, heard directly by the Board, began on September 9, 1996 and concluded on February 7, 1997. (BAa5-6). Final Board determinations in this Docket were made at the Board's public agenda meetings of July 17, 1997 and September 9, 1997. (BAa1). Among those determinations, was the Board decision to "apply the generic rates, terms and conditions set forth in this [Generic] Order to the interconnection agreement between AT&T and BA-NJ to the extent that those rates, terms and conditions have not been successfully negotiated by AT&T and BA-NJ." (Aa156). The Generic Order memorializing these decisions was released on December 2, 1997.

³ This investigation became commonly known as the "Generic Proceeding," and the Order which culminated this proceeding, the "Generic Order."

Meanwhile, on July 15, 1996, AT&T petitioned the Board for an arbitration of an interconnection agreement with BA-NJ. (Aa159). On November 8, 1996, the arbitrator assigned by the Board issued his report and decisions. (*Ibid.*). Lengthy negotiations followed, aimed at reducing the arbitrator's decision to an interconnection contract. (*Ibid.*). On July 25, 1997 and on August 5, 1997, differing unexecuted interconnection agreements which included the rates determined by the arbitrator and the generic rates determined by the Board, were submitted for Board approval by AT&T, and by BA-NJ, respectively. (*Ibid.*). An interconnection agreement containing the generic rates was approved by the Board on October 8, 1997. (Aa158). The Order memorializing that decision was issued on December 22, 1997. (Aa158-166).

AT&T filed its complaint in the United States District Court on November 24, 1997, which complaint was amended following the Board's issuance of the Generic Order. A Consent Order permitting intervention by the Advocate was entered on February 2, 1998. On June 6, 2000, the District Court issued its decision affirming the Board's authority to substitute its generic rates for the rates determined by the AT&T/BA-NJ arbitrator. The Advocate filed a Notice of Appeal on June 30, 2000.

COUNTER STATEMENT OF FACTS

The Federal Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §151 et seq.) ("the Act"), effective February 8, 1996, sets forth a national policy framework to establish a competitive and deregulated telecommunications environment. In revising communications laws that had been in existence

since 1934, the Act removed barriers to entry into the telecommunications marketplace by directing that

[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

[47 U.S.C. §253(a)].

However, notwithstanding 47 U.S.C. §253(a), pursuant to the Communications Act of 1934, states continue to have jurisdiction over “charges, classifications, practices, services, facilities, [and] regulations for or in connection with intrastate communications service.” 47 U.S.C. §152(b).

The Act is intended to provide for a pro-competitive, deregulatory policy designed to accelerate rapid deployment of advanced telecommunications and information services, and technology by opening all telecommunications markets to competition. The obligations of Incumbent Local Exchange Carriers (“ILECs”) include, but are not limited to, the duty to provide interconnection with the networks of requesting carriers, the duty to provide nondiscriminatory access to unbundled network elements (“UNEs”), and the duty to offer for resale at wholesale rates any telecommunications service that the ILEC provides to subscribers who are not telecommunications carriers. 47 U.S.C. §251.

Pursuant to the Act, specifically 47 U.S.C. §252(d)(1), the FCC issued its guidelines with respect to the implementation of local competition in its First Report and Order, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, et al., Docket No. 96-98, “FCC Rcd 15499 (1996) (“Local Competition Order”). The Local

Competition Order established that the prices new entrants pay for interconnection and unbundled elements be based on the local telephone companies' Total Element Long-Run Incremental Cost ("TELRIC") for a particular element. Local Competition Order ¶672.

At the urging of numerous state commissions and local exchange companies, the United States Circuit Court of Appeals for the Eighth Circuit subsequently found certain provisions of the FCC Order to be outside the FCC's authority. In relevant part, the Court found that the FCC did not have the authority to set local (intrastate) rates for interconnection, unbundled network elements or resale. Iowa Utilities Board v. Federal Communications Commission, et al., 109 F.3d 418 (8th Cir. 1996), cert. granted, 118 S. Ct. 879 (1998).⁴ This ruling, in effect at the time of the Board's decisions which are appealed from herein, freed the states to develop state-specific costs.

On December 8, 1995, prior to passage of the Act, the New Jersey Board of Public Utilities ("Board") initiated an investigation and rulemaking proceeding to determine whether or not to permit local exchange competition in New Jersey and, if so, under what terms and conditions such competition should be allowed. (Ab2).

At its regularly scheduled public agenda meeting of June 19, 1996, the Board determined to take a two-step approach to continue the transition to a competitive local exchange marketplace envisioned by the Act. As an initial step, the Board would await the receipt of

⁴ The 8th Circuit's decision was later affirmed in part, reversed in part, and remanded. AT&T Corp., et al. v. Iowa Utilities Board, et al., 525 U.S. 366 (1999). Notably the Court found that the FCC had jurisdiction to design a pricing policy, and remanded the dispute back to the 8th Circuit for consideration of the substantive merits of the FCC's pricing rules. On remand, the 8th Circuit vacated 47 C.F.R. §51.505(b)(1), a portion of the FCC's TELRIC standard. Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000).

negotiated agreements or arbitration requests and utilize that process to determine the appropriate rates, terms and conditions of interconnection for those individual carriers making such filings. The second step contemplated a generic rulemaking/adjudicative proceeding to determine the core issues of cost of a LEC's basic telephone service; the appropriate rates, terms and conditions of interconnection; and wholesale resale rates applicable to all services. (Aa94-Aa95). (Decision and Order, Docket No. TX95120631 (June 20, 1996) at 2)). Regarding the outcome of the generic portion of the proceeding, the Board indicated that the "generic terms and conditions shall be offered as guidelines for all entities who are not parties to either negotiated agreements or arbitrated determinations, thus allowing the Board to determine the appropriate terms and conditions for a competitive local exchange marketplace." (Aa95).

Accordingly, the Board authorized the initiation of the generic proceeding, which included the Advocate, and directed the conduct of a prehearing conference of the parties in order to refine the issues and establish certain procedures related to the conduct of evidentiary hearings. Among the issues to be addressed in the fact finding component was the determination of interconnection rates. Id.

Prehearing conference meetings were held on July 9 and July 15, 1996. Based upon the discussions at those meetings, the Board issued a Prehearing Order dated August 7, 1996 ("Prehearing Order"). (BAa36-43). In the Prehearing Order, the Board described the generic proceeding as follows:

[t]he generic proceeding will provide the Board with essential information for the Board to develop general terms and conditions of interconnection for parties not yet requesting arbitration. In particular, the information developed in this proceeding may well

be relevant in assisting the Board to avoid disparate or inconsistent decisions with respect to the issues in those arbitrations.

- - [Ba38].

The Board also approved a statement of the policy and fact issues that would be decided in the proceeding, as agreed to by the parties. Among the fact issues which would require testimony under oath and subject to cross-examination were the following:

- (a) [i]nterconnection rates, terms and conditions including
 - (1) rates;
 - (2) extent of unbundling;
 - (3) number administration;
 - (4) terms and conditions regarding termination of traffic;
 - (5) other technical requirements, including access to rights of way and collocation;
 - (6) business practices; and,
- (b) [d]evelopment of wholesale/resale rates.

[BAa40].

The Prehearing Order also established hearing dates for the presentation of evidence and the cross-examination of witnesses. Id. at 6.

At its public agenda meetings of July 17, 1996 and August 8, 1996, the Board considered and adopted procedures to implement the negotiation and arbitration provisions of the Act (47 U.S.C. §252), rejected requests to consolidate the arbitration issues and rejected participation in arbitrations of parties other than the negotiating public utilities. (BAa44-72) (I/M/O the Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, BPU Docket No. TX96070540 (August 15, 1996) ("Arbitration Order")); aff'd, Division of Ratepayer Advocate v. New Jersey Board of Public Utilities, Docket No. A-7421-95 (App. Div. August 23, 1996), certif. denied, 146 N.J. 498

(1996). The Arbitration Order established that arbitrations were to be conducted by an outside party possessing expertise in arbitration. (BAa47). The procedures adopted by the Board for arbitration provided that the parties to arbitrations incorporate the arbitration award into an interconnection agreement and submit that agreement to the Board within five (5) days after issuance of the arbitration award. This expedited time frame was established in deference to the Act's requirement for State action to resolve arbitrations within nine (9) months after the date on which the LEC received a request for negotiation of an interconnection agreement. BAa (Arbitration Order, Appendix A at 8); 47 U.S.C. §252(b)(4)(C).

The Arbitration Order also addressed a motion for reconsideration of the Board's oral decision of July 17, 1996 filed by the Advocate on July 23, 1996. BAa-BAa. The Board denied the Advocate's request to participate in the arbitrations based on, among other things, the Act not providing for third-party intervention in such proceedings. (BAa54). However, the Board did provide the Advocate with the opportunity to review the record of arbitrations and the right to comment on interconnection agreements presented to the Board for approval. (BAa58-BAa60).

On July 15, 1996, AT&T Communications of New Jersey, Inc. ("AT&T") and Bell Atlantic - New Jersey ("BA-NJ") contemporaneously filed their arbitration request with the Board pursuant to 47 U.S.C. §252. As permitted by 47 U.S.C. §252(b)(1), AT&T's request for arbitration followed by 135 days its request for negotiations with BA-NJ, which it filed on March 1, 1996. On August 8, 1996, BA-NJ filed a response to AT&T's request. On August 15, 1996, at the same time it released the Arbitration Order, the Board selected an arbitrator to conduct the AT&T/BA-NJ arbitration. (Aa8). The arbitrator issued a decision on November 8, 1996

adopting permanent rates based largely upon the Hatfield Version 2.2.2 Model ("Hatfield model") submitted by AT&T, as opposed to the interim rates ultimately requested by BA-NJ. (Aa107).

Beginning in September of 1996 through February 1997, twenty-five days of evidentiary hearings were held before Commissioner Carmen J. Armenti on the first three phases of the generic proceeding.⁵ Among the active parties to the resale and interconnection phases of the proceeding were the following: the Advocate, BA-NJ, AT&T, Sprint Communications Company, L.P. and United Telephone Company of New Jersey, Inc. (collectively "Sprint") and MCI Telecommunications Corporation ("MCI"). Board Staff from the Division of Telecommunications ("Staff") also participated in the proceeding.

Witnesses and cost models were presented by AT&T, BA-NJ, MCI, Sprint and the Advocate, as well as numerous other parties who were active in the proceedings. All witnesses were subject to cross-examination. With regard to the interconnection phase of the proceeding, initial and reply briefs were filed on February 25, 1997 and March 11, 1997, respectively by AT&T, BA-NJ, MCI, Sprint and the Advocate. On January 16, 1997, the Board also requested, by letter of its Secretary, comments from all interested parties on the applicability of generic rates to be determined by the Board. (Aa126).

By joint letter dated January 17, 1997, AT&T and BA-NJ informed the Board that the process of reducing the arbitrator's decision to an agreement was consuming considerably

⁵ The Board divided the generic proceeding into four components: a cost of service phase, a resale phase, an interconnection phase and a universal service phase. The universal service evidentiary hearings were held in October and November 1997. The issues surrounding universal service are not relevant to the issues raised in this appeal.

more time than previously anticipated. (Aa136). At the time of the Board's decision in the generic proceeding, the parties had yet to present an interconnection agreement to the Board. (Aa14).

At its July 17, 1997 agenda meeting, the Board rendered its decision in the generic proceeding as to the terms and conditions relating to interconnection, access to UNEs and resale. The Board rejected the cost study proposed by the Ratepayer Advocate and determined that it could not accept in their entirety either the cost studies submitted by BA-NJ or the Hatfield model submitted by AT&T and MCI. Therefore, based on the evidence presented at the evidentiary hearings and the arguments made in the parties' briefs, the Board developed generic rates by according BA-NJ's cost studies 60% weight and the Hatfield model 40% weight. The Board also considered four critical inputs to the models and required certain adjustments thereto. In addition, the Board eliminated an additional cost recovery factor proposed by BA-NJ. The Board determined that the generic rates that it had established would be applicable to any interconnection agreements previously submitted to the Board for approval which had labeled rates "interim" pending the outcome of the generic proceeding. (Aa123). Furthermore, the Board decided that the rates established through the generic proceeding would be applicable to the agreement to be entered into between BA-NJ and AT&T, "to the extent that those rates had not been successfully negotiated by AT&T and BA-NJ." (Aa156). At its September 9, 1997 agenda meeting, the Board reaffirmed its decision to substitute the generic rates it had established for the rates approved in the AT&T/BA-NJ arbitration. The Board issued its written Order in the generic proceeding ("Generic Order") on December 2, 1997. (BAa1-17; Aa121-156). The Order set forth in detail the bases for the Board's determinations and expressly represents that the

Board would monitor the competitive market and revisit the generic rates is had established, if appropriate. (BA16-17).

On July 25, 1997, AT&T submitted a document to the Board referred to by AT&T as an interconnection agreement. (Aa159). The "agreement" included the rates established by the arbitrator's award. On August 5, 1997, BA-NJ submitted a document to the Board referred to by BA-NJ as an interconnection agreement. (Ibid.). The "agreement" included the rates established by the Generic Order. Additionally, on August 5, 1997, AT&T submitted a letter to the Board, agreed to by counsel for BA-NJ, that stated that the parties agreed to sign whichever "agreement" the Board approved. (Ibid.). By order dated September 18, 1997, the Board held that, pursuant to its previous orders, it would not review an interconnection agreement that was not fully executed by all parties. (Ibid.). In addition, the Board stated that, as decided at its July 17, 1997 agenda meeting and reaffirmed at its September 9, 1997 agenda meeting, in the absence of negotiated rates, terms and conditions, the Board approved generic rates, terms and conditions are applicable. (Ibid.). By letter dated September 15, 1997, BA-NJ and AT&T submitted a joint application for approval of an interconnection agreement containing the Board's generic rates, terms and conditions. (Aa159-160). By Order dated December 22, 1997, the Board approved the interconnection agreement submitted by AT&T and BA-NJ. (Aa158-165).

On November 24, 1997, a complaint was filed before the District Court by AT&T. The complaint sought review of the Board's decision that the rates established in the generic proceeding would be applicable to the agreement to be entered into by BA-NJ and AT&T

rather than the rates established by the arbitrator's decision. (Aa9). On January 12, 1998, subsequent to the issuance of the Generic Order, AT&T filed an amended complaint. (Aa54-92).

A Consent Order permitting intervention by the Advocate was entered on February 2, 1998. On June 6, 2000, the District Court issued its decision affirming the Board's authority to substitute its generic rates for the rates determined by the AT&T/BA-NJ arbitrator. The Advocate filed a Notice of Appeal on June 30, 2000.

STANDARD OF REVIEW

The Court should review de novo the District Court's affirmation of the Board's decision to substitute generic rates found by the Board to be consistent with the Act, for arbitrated rates which were based upon a flawed study "as a proper exercise of authority under the Act." (Issues 1 and 2, supra). See GTE South, Inc. v. Morrison, 199 F.3d 733 (4th Cir. 1999).

STATEMENT OF RELATED CASES

A petition for a declaratory ruling seeking preemption of the Board's Generic Order decision to substitute generic rates for AT&T/BA-NJ arbitrated rates was filed with the FCC on March 3, 2000, and remains pending. CC Docket No. 00-49. Before the Board are two related proceedings: the Board's review of BA-NJ's unbundled network elements on remand from the District Court (BPU Docket No. TO00060356), and the AT&T/BA-NJ arbitration filed by AT&T on November 15, 2000 (BPU Docket No. TO00110893).

ARGUMENT

POINT I

- - THE DISTRICT COURT'S AFFIRMATION OF THE BOARD'S DETERMINATION THAT, TO THE EXTENT THAT RATES, TERMS AND CONDITIONS HAD NOT BEEN SUCCESSFULLY NEGOTIATED, THE GENERIC RATES, TERMS AND CONDITIONS APPROVED BY THE BOARD AFTER EXTENSIVE EVIDENTIARY HEARINGS WERE APPLICABLE TO THE INTERCONNECTION AGREEMENT TO BE ENTERED INTO BETWEEN AT&T AND BA-NJ, IS A REASONABLE DECISION AND CONSISTENT WITH THE TELECOMMUNICATIONS ACT.

As a preliminary matter, this Court should consider the fact that circumstances have greatly changed since this appeal was filed. Pursuant to the District Court's decision which to the Board its decision on the rates for BA-NJ's unbundled network elements, on June 7, 2000, the Board began another generic proceeding to examine BA-NJ's costs and set UNE rates. (Aa149-150). On November 15, 2000, AT&T petitioned the Board for arbitration of a new interconnection agreement with BA-NJ, and determined that it will not raise UNE rate issues in its arbitration, but will litigate them in the new generic proceeding. (Aa133-143). Accordingly, serious questions have arisen with regard to both the mootness of this appeal, and the standing of the Advocate to bring it. Nevertheless, in the event that this Court chooses to determine the merits of this appeal, the Board's substantive arguments for affirmation of the District Court's decision follow.

The Board in the generic proceeding found substantial deficiencies in the AT&T sponsored Hatfield model, which largely formed the basis of the rates awarded by the AT&T/BA-NJ arbitrator. (BAa13-16; Aa107-108). For example, the Board criticized the Hatfield Model for its ability to (1) estimate long lengths and assign customers to wire centers

(Ba13), (2) to estimate outside plant costs (Ba14), (3) to correctly configure carrier thermal equipment (*Id.*), (4) for its utilization of unsubstantiated outside plant costs (*Id.*), and its utilization of non-New Jersey data (BAa15). Having the benefit of a full review of the Hatfield model is generic proceeding, the concluded that the Hatfield Model 2.2.2 is "under-engineered and may not result in a network that produces safe, adequate, and proper service" (*Id.*), and that "the very serious engineering flows identified repeatedly on the record...[in] the Hatfield Model 2.2.2 may not provide dialtone to end users." (Ba16). Before the District Court, both AT&T and the Advocate maintained that the Board was required to disregard these findings rendered at the conclusion of the generic proceeding and to approve the arbitrator's rates which were based on the Hatfield model. The Advocate, in fact, continues to argue that the Board is precluded from making judgments different from the assigned arbitrator, and asserts that an agreement based on the arbitrator's award would comply with the Telecommunications Act and that it, therefore, must be approved by the Board. The Advocate argues that Section 252 of the Act "only permits the Board to accept or reject arbitrated rates; it does not otherwise authorize the Board to modify, alter or replace the rates developed through arbitration between the parties." Ab18. As will be demonstrated below, the Advocate's arguments have no merit. Contrary to its claim, the District Court's affirmation and the Board's determination that, to the extent that rates, terms and conditions had not been successfully negotiated, the generic rates, terms and conditions were applicable to the interconnection agreement to be entered into between AT&T and BA-NJ are reasonable decisions and fully consistent with the Telecommunications Act.

As noted, supra, the June 20, 1996 Board Order was issued in a docket commenced by the Board prior to the enactment of the Telecommunications Act in order to

determine whether or not to permit local exchange competition and if so, under what terms and conditions. (Aa94-96). With the enactment of the federal Act, the Board recognized the need to commence the transition to a competitive local exchange market and to expeditiously address and implement the Act's requirements, lest it be preempted pursuant to 47 U.S.C. § 252(e)(5). By its June 20, 1996 Order, the Board indicated that it would utilize a two step approach: it would await receipt of negotiated agreements or arbitration requests, but would simultaneously also establish a generic proceeding to provide for general rates, terms and conditions to be offered as guidelines to entities not parties to either negotiated agreements or arbitrated determinations. It also directed that a prehearing conference be held in the generic proceeding to refine the issues.

The Board's Prehearing Order dated August 7, 1996, memorialized decisions made in its July 31, 1996 agenda meeting held only slightly more than one month after its June 20, 1996 Order. In that Order, the Board made several pertinent statements. In rejecting requests made by AT&T and others to defer consideration of the interconnection and wholesale generic rate issues until after the conclusion of the arbitrations, the Board explained:

the information developed in this [generic] proceeding may well be relevant in assisting the Board to avoid disparate or inconsistent decisions with respect to the issues in those arbitrations. Moreover, the generic proceedings will provide an avenue by which parties not participating in negotiations and arbitrations can apprise the Board of important concerns on the very issues that the Board will later consider in its review of the agreements.

[BAa38, emphasis supplied].

The Board made similar observations in its August 15, 1996 Order, which memorialized decisions made at public meetings on July 17, 1996 and August 8, 1996. (BAa44-

72). In this Order, the Board established procedures to implement 47 U.S.C. §252. The Board determined to utilize outside experts to conduct arbitrations, rather than having the Commissioners, themselves, conduct each arbitration. (BAa47). However, nowhere do the arbitration procedures provide that the Board is bound by judgments and rulings made by the arbitrators. Indeed, such a provision would be inconsistent with the Board's duties and responsibilities under N.J.S.A. 48:2-1 et seq., pursuant to which, the Board has general supervision, regulation of, and jurisdiction over all public utilities, including entities providing telecommunications services in New Jersey. Furthermore, while the Board rejected requests by the Advocate to directly participate in the arbitration process, its procedures permitted the Advocate to provide comments to the Board on an arbitration award and interconnection agreement prior to a Board decision. (Ba58; 72). Moreover, as it did in its August 7, 1996 Order, in its August 15, 1996 Order, the Board also noted that the then existing generic proceeding, in which hearings were scheduled to begin September 9, 1996 and conclude October 11, 1996, was such that the Board would have the benefit of the input of the Advocate and all participants in the generic proceeding on the issues of interconnection and wholesale rates before the Board rendered decisions on agreements resulting from then pending arbitrations. (BAa38; 58-59).

Thus, as it considered and adopted procedures to implement the Act, the Board gave notice that it envisioned the generic proceeding as a valuable source of input by the Advocate and others which would inform its deliberations regarding negotiated and arbitrated agreements. Accordingly, the Advocate and all the parties to the generic proceeding were clearly on notice during the summer and fall of 1996, well in advance of the BA-NJ/AT&T arbitration,

that the Board considered that the generic proceeding results would inform and might impact upon its arbitration decisions. It was plain from the procedures established that an arbitrator's decision was subject to being considered by the Board not in isolation, but along with any Advocate comments and the generic proceeding results.

Moreover, it was entirely reasonable and not inconsistent with the Act or the Board's procedures for the Board to take into account information gathered and findings and conclusions made in the generic proceeding. The Act itself provides that a State commission may require a party to an arbitration

to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

[47 U.S.C. §252(b)(4)(B)].

That the Board authorized an arbitrator to conduct the arbitration hearing and that arbitrator made certain decisions on what information was necessary for a decision, did not preclude the Board from utilizing such information as it believed necessary to reach a decision; this is particularly so when the agency has given notice that it may do so. Otherwise, the Board would be unable to comply with its obligation under 47 U.S.C. §252(c) to ensure that arbitrated resolutions meet the requirements of Section 251 and that the rates comport with Section 252(d)'s pricing standards. Indeed, 47 U.S.C. §252(g) permits a State commission to consolidate Section 252 proceedings, which include arbitrations as well as a Bell operating company's ("BOC") statement of generally

available terms and conditions⁶, thereby recognizing that a State is not precluded from taking into account broader sources of information than a single arbitration involving a single ILEC and a single competitive local exchange carrier ("CLEC").

Furthermore, in construing the Act, the FCC has recognized that "in some cases, it may not be possible for carriers to prepare, or the state commission to review, economic cost studies within the statutory time frame for arbitration" and states, therefore, could establish interim arbitrated rates based on FCC proxies. Local Competition Order at ¶767. Thus, the setting of interim rates for an arbitrated agreement was recognized by the FCC as an appropriate measure until such time as a state could render a decision upon a fuller record and review. Several states have adopted this approach, utilizing a generic proceeding to determine permanent interconnection rates. See e.g. U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117-19 (9th Cir. 1999) (State of Washington Utilities and Transportation Commission adopted a two-stage process for fixing interconnection rates: interim rates to be set by arbitration and permanent rates set in a generic proceeding). That the AT&T/BA-NJ arbitrator chose not to utilize interim rates pending the generic proceeding or other fuller cost record did not preclude the Board from making a different judgment.

Thus, had an agreement been presented to the Board prior to the conclusion of the generic proceeding, the Board would not have been precluded by the arbitrator's decision from establishing interim rates pending a fuller review of costs in the generic proceeding. To find

⁶ Although the Board had denied motions to consolidate arbitrations, (BAa62), 47 U.S.C. §252(g), nevertheless, is instructive and supportive with regard to the Board taking into account its generic proceeding rulings in connection with an arbitration.

otherwise would result in the absurd result of the arbitrator's ruling superseding the State commission's decision.

With respect to the submission of an agreement, although the Board's procedures on arbitrations called for an interconnection agreement to be submitted to the Board within five days after the parties' receipt of the arbitrator's decision (BAa71), by joint letter dated January 17, 1997, AT&T and BA-NJ informed the Board that the process of reducing the arbitrator's decision to a contract was consuming considerably more time than previously anticipated and that they were "continuing in their negotiations, and will inform the Board as soon as possible of further developments towards completion of the final interconnection agreement." (Aa136). At the time of the Board's consideration of the generic proceedings at its July 17, 1997 agenda meeting, no interconnection agreement had been presented to the Board, nor had either of the parties requested or sought Board assistance in reaching an agreement. (Aa136-137). The District Court aptly noted this fact. (Aa14-15). The Court correctly observed that

[b]y the time Bell and AT&T submitted their respective agreements for approval, the generic proceedings had revealed engineering problems with the Hatfield model that Judge Thompson's findings rested on. The Board's decision not to approve rates from a model which was problematic is consistent with its authority under the Act.

[District Court Opinion at 10; Aa15].

With the conclusion of the generic proceeding, the generic rates established by the Board reflected the best information available to the Board, and a greater body of relevant information than what was before the AT&T/BA-NJ arbitrator. The Board reasonably determined that it could not ignore the cost evidence in the more extensive generic proceeding in

ascertaining just and reasonable rates for interconnection and network elements, which must be based on cost and be nondiscriminatory, 47 U.S.C. §252(d), and could not ignore its determinations as to the appropriate costs upon which just and reasonable rates must be based. The Board reasonably concluded that the public interest required it to structure rates based upon the best information then available to it. It was entirely reasonable and consistent with the Act's cost-based pricing standard, 47 U.S.C. §252(d)(1)(A) and 47 U.S.C. §252(e)(2)(B), for the Board to determine that interconnection and network elements could not be based upon costs premised largely upon the Hatfield model, which it found in the generic proceeding had substantial deficiencies, and for the Board to, in effect modify the AT&T/BA-NJ arbitrator's award in this regard. Indeed, as the pertinent State commission, the Board is obligated by 47 U.S.C. §252(c) to ensure that in resolving open issues by arbitration, rates are established which satisfy the pricing standards of 47 U.S.C. §252(d).

The Board also was appropriately concerned that although both the AT&T/BA-NJ arbitrator and the MCI Telecommunications Corporation/BA-NJ arbitrator were faced with the same body of cost information, the Hatfield model and the FCC's default and proxy rates, the AT&T/BA-NJ arbitrator set permanent rates founded upon the Hatfield model, while the MCI arbitrator chose the FCC's default and proxy rates and set interim rates pending the outcome of the generic proceeding. Clearly, contrary to Advocate's contention (Ab22), it was reasonable and consistent with the pro-competitive goals of the Telecommunications Act for the Board to consider that the arbitrators' rates for BA-NJ's two largest competitors were substantially and materially inconsistent. (Aa147-149).

Contrary to the Advocate's contentions (Ab18-23; Ab36-40), the Board's action is neither ultra vires nor preempted but rather is fully consistent with the Act's requirement that interconnection and network element rates be based on costs. The Advocate's claim that the rates awarded by the arbitrator are consistent with the Act, and that therefore an agreement embodying such costs must be approved by the Board would have the Board, the District Court and in turn, this Court, ignore the Board's findings that "the Hatfield 2.2.2 model is under-engineered and may not result in a network that produces safe, adequate and proper service, both from a technical and economic perspective and, therefore, does not produce its own, reasonable results." (BAa15). While the rates approved by the arbitrator, to the extent premised upon the Hatfield model, purported to be based upon costs, they were based upon costs found by the Board not to be a proper basis for just and reasonable rates. Furthermore, to the extent that the arbitrator relied in part upon the FCC default proxy rates, those rates were intended to serve as the basis for interim rates pending a fuller examination of costs by a State commission, not the basis of permanent rates as determined by the arbitrator. Local Competition Order, ¶619. A fuller examination of costs, in fact, took place in the Board's generic proceeding. Moreover, to the extent that the Advocate argues that the arbitrator considered all of the filings, conducted hearings with cross-examination, and considered all arguments of the parties in post arbitration briefs as a basis to support the legitimacy of the arbitrator's decision, and the requirement that the Board passively approve it without consideration of any other information, the Advocate ignores the arbitration procedures adopted by the Board, in part, to accommodate concerns raised by the Advocate itself, so as to permit an opportunity for input to the Board on arbitrations prior to a Board decision.

Nor does the Advocate's reliance on and lengthy discussion of In the Matter of the Public Utility Commission of Texas, Memorandum Opinion and Order, FCC 97-346, 13 FCC Rcd. 3460 (Oct. 1, 1997), petition for recon. pending, petition for review denied, City of Abilene, Texas v. FCC, 164 F.3d 49 (5th Cir 1999) (Ab37-Ab39) support its claim that the Board was required to approve the rates awarded by the arbitrator. Relying upon discussion by the FCC in preempting certain Texas provisions which prevented the ability of a carrier to negotiate or arbitrate different provisions (e.g., a tariff provision restricting the resale of Centrex to contiguous properties) and discussions in which provisions were not preempted because the use of negotiation or arbitration was not prohibited (e.g., a 5 percent resale discount regulation), the Advocate argues that the Board's finding that its generic rates for unbundled network elements were applicable to the AT&T/BA-NJ agreement, rather than the arbitrator's, thwarted AT&T's ability to negotiate or arbitrate more favorable provisions and rendered Section 252(i)⁷ meaningless, and therefore, the Board's ruling is preempted. (Ab39). The Advocate argues that the Board "established a single rate which is both a minimum and a maximum for unbundled network elements. This one-rate requirement violates the FCC's preemption orders, because the setting of a single rate precludes telecommunications carriers from negotiating and arbitrating more favorable provisions." (Ab41). In fact, however, the Advocate ignores the fact that the FCC had ruled that "[i]n arbitrations of interconnection arrangements, or in rulemakings the results of which will be applied in arbitrations, states must set prices for interconnection and

⁷ Section 252(i) requires a LEC to "make available any interconnection, service, or network element provided under an agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

unbundled network elements based on the forward-looking, long-run incremental cost methodology we describe below. Using this methodology, states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element,” Local Competition Order, ¶620 (emphasis supplied). What was done by the Board in its Generic Order is plainly consistent with the FCC’s ruling.

Additionally and contrary to the Advocate’s arguments (Ab30), the Generic Order does not preclude the prospective use of negotiations or arbitrations. The Generic Order in Section VI addresses the applicability of the generic rates, terms and conditions to only two categories of rates: (1) the numerous approved or pending agreements, each of which had, by their own terms, incorporated interim provisions pending the generic decision, which thereafter would govern, and (2) the only other pending matter, the AT&T/BA-NJ arbitrator decision, which included non-interim rates but had not been incorporated into an agreement and remained open at the time of the Board’s deliberations. (Aa123). Accordingly, the Ratepayer is simply wrong in its contention that the Board’s action “precludes telecommunications carriers from negotiating and arbitrating more favorable provisions under Sections 251 and 252 of the Act.” (Ab41). In establishing generally available terms and conditions that will be available to any entity choosing to provide service in New Jersey, and therefore avoid the need to arbitrate each and every company’s request (Aa95), the Board, in the Generic Order, made no ruling and issued no directive precluding ILECs and CLECs from prospectively negotiating or arbitrating in an attempt to obtain more favorable terms, subject to approval by the Board under Section 252’s standards. Unlike the AT&T/BA-NJ arbitrator, however, prospective arbitrators will be able to be guided by the Board’s analyses set forth in the Generic Order in evaluating the records created

before them. Thus, contrary to the Advocate's arguments that Section 261 does not provide a basis for the District Court's ruling (Ab24-26), the generic proceeding and Order are fully in accord with the State's authority under 47 U.S.C. §261(b) and (c) to prescribe regulations and impose requirements not inconsistent with the Act or FCC regulations. See also, 47 U.S.C. §251(d)(3); Michigan Bell Telephone Co. v. Strand, 26 F. Supp.2d 993 (W.D. Mich. 1998) (relying in part upon Section 261(c), court dismissed a claim challenging State commission's order alleged to effectively require modification of an interconnection agreement). The rates, terms and conditions resulting from the generic proceeding serve the same purpose with regard to BA-NJ as an approved statement of generally available terms and conditions, which, pursuant to 47 U.S.C. §252(f), a Bell operating company may file with a State commission to set forth the terms and conditions the company generally offers within the State to comply with the requirements of Section 251, the regulations thereunder, and the standards applicable under Section 252.

For the foregoing reasons, the District Court's affirmation of the Board's determination that, to the extent that rates, terms and conditions had not been successfully negotiated, the generic rates, terms and conditions were applicable to the interconnection agreement to be entered into between AT&T and BA-NJ is a reasonable decision and consistent with the Telecommunications Act, and should be affirmed by this Court.

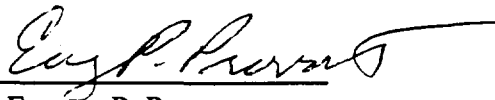
CONCLUSION

For the reasons set forth above, the decision of the District Court should be affirmed.

Respectfully submitted,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants-Appellees New Jersey
Board of Public Utilities,
Herbert H. Tate and Carmen J. Armenti,
in their capacity as Commissioners
of the Board of Public Utilities

Dated: December 23, 2000

By: 
Eugene P. Provost
Deputy Attorney General

Docket No. 00-2000

IN
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T Communications of New Jersey, Inc.
Plaintiff

State of New Jersey Division of the Ratepayer Advocate,
Plaintiff-Intervenor

v.

Bell Atlantic-New Jersey, Inc., and
The New Jersey Board of Public Utilities, an agency, and
Herbert H. Tate and Carmen J. Armenti, in their official
capacities as Commissioners of the Board of Public Utilities,
Defendants.

On Appeal from an Order of the
United States District Court, District of New Jersey

CERTIFICATION OF
BAR MEMBERSHIP (3rd Cir. LAR 46.1)

EUGENE P. PROVOST, of full age sworn upon his oath, certifies and says:

1. I am a Deputy Attorney General admitted to the practice of law to the bar of the State of New Jersey.
2. I am also, as of September 24, 1992, a member in good standing of the bar of the Third Circuit Court of Appeals as required by 3rd Circuit Local Rule 46.1.
3. I certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Eugene P. Provost
Deputy Attorney General

Dated: December 22, 2000

CERTIFICATION

I hereby certify that an original and nine (9) copies of the Brief on behalf of Defendants-Appellees New Jersey Board of Public Utilities, and Herbert H. Tate and Carmen J. Armenti, in their official capacity as Commissioners, were today sent by UPS Next Day Air to the Clerk of the United States Court of Appeals for the Third Circuit, and that two (2) copies of the Brief have been mailed, postage pre-paid to:

Barry S. Abrams, Esq.
Verizon New Jersey, Inc.
540 Broad Street, 20th Fl.
Newark, N.J. 07101

Frederick K. Becker, Esq.
Anne S. Babineau, Esq.
Matthew Weismann, Esq.
Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
P.O. Box 10 - Suite 900
Woodbridge, N.J. 077095

Monica Otte, Esq.
Frederick Pappalardo, Esq.
Gregory Smith, Esq.
AT&T Communications of NJ, LP
295 North Maple Avenue
Room 3136C2
Basking Ridge, NJ 07920

David T. Zaring, Esq.
U.S. Department of Justice
Federal Programs Branch
901 E Street, N.W., Room 907
Washington, D.C. 20004

James H. Laskey, Esq.
Norris, McLaughlin & Marcus
721 Route 202-206
P.O. Box 1018
Somerville, N.J. 08876

James Bendernagel, Jr., Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Samuel Moulthrop, Esq.
Riker, Danzig, Scherer Hyland
& Perretti
Headquarters Plaza
One Speedwell Avenue
P.O. Box 1018
Morristown, NJ 07962

Jodie Kelley, Esq.
Jenner & Block
601 13th Street
12th Floor
Washington, D.C. 20005

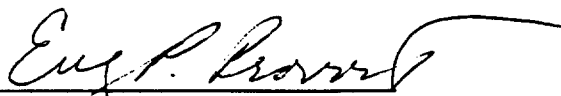
In addition, I have caused to be hand delivered on December 26, 2000, three (3) copies of the Brief to the following:

Blossom A. Peretz, Esq.
Division of the
Ratepayer Advocate
31 Clinton St., 11th Floor
Newark, N.J. 07101

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

Dated: December 23, 2000

BY:


Eugene P. Provost
Deputy Attorney General